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In the Supreme Court
of the
United States
OCTOBER TERM, 1937.

No. 342

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION,
PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(Filed.....)

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No.....

RANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

MONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

TITION FOR WRIT OF CERTIORARI TO THE JNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

the Honorable Charles Evans Hughes, Chief Justice f the United States Supreme Court, and to the Associate Justices of the United States Supreme Court:

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

The involved action was brought in the District rt of the United States for the Western District of

Missouri by petitioners, as trustees of the Chicago, Rock Island & Pacific Railway Company, against respondent, Simonds-Shields-Lonsdale Grain Company, to recover for services of the trustees in installing grain doors in box cars in which grain in bulk was shipped in interstate commerce by respondent. For convenience, petitioners will be referred to as "plaintiff carrier" and respondent as the "shipper." Judgment was for the shipper in the District Court on the appeal of plaintiff carrier, and the Circuit Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court (R. 123, 124), by a vote of two members, with Judge Woodrough dissenting. Petition for rehearing was denied August 4, 1938, (R. 131). The case was tried to the court upon formal waiver of a jury. The facts were largely stipulated, (R. 57 to 73), and the District Court found the facts as stipulated, (R. 104).

Grain doors are wooden barriers placed inside of box car doors to prevent bulk grain loaded into the cars from leaking out of the doors, (R. 76-7, 93-4). Plaintiff carrier sued for the installation of grain doors at Kansas City, during the period of July 5, 1935 to February 29, 1936, in 624 box cars placed by plaintiff carrier for loading at the shipper's elevator, loaded with bulk grain by the shipper and transported for it in interstate commerce, (R. 63, 70).

Prior to July 1, 1935 all carriers installed grain doors, at Kansas City and other terminal elevator points, in cars transported by them, without separate charge to the shippers for such installation, and there was no tariff provision for a charge by the carrier for such service. Effective July 1, 1935 a new tariff provision was added to the freight tariffs filed with the Interstate Commerce Commission which provided that the installa-

on of grain doors should be a service performed by r at the expense of the shipper. The provision in uestion, identified as Item 70 of Western Trunk Lines ariff, No. 330 (R. 59) reads as follows:

> "The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time: * * * Kansas City—Mo.-Kan."

In proceedings before the Interstate Commerce Commission attacking the provision, the Commission held e provision reasonable except for the amount of the arge, and that sixty cents (60c) per car instead of e dollar ($1.00) per car was and in the future would e a reasonable charge (R. 82, 86). (220 I. C. C. 753). ollowing the ruling of the Commission, and prior to e trial, plaintiff carrier reduced the amount sued for om $1.00 per car to 60c per car, and by requested eclaration of law at the trial sought judgment for such nount (R. 104). The tariff provision in question reained in effect throughout the period sued for (R. , 75, 73).

The shipper by its answer (1) attacked the tariff ovision as unreasonable and (2) averred that it was t liable in any event because there had not been "prior rangements for the service" withm the meaning of the riff provision (R. 46-7).

One day after the tariff provision became effective, July 2, 1935, defendant shipper and other shippers ote plaintiff carrier and other carriers that regards of the tariff provision in question, the shippers

expected the carriers "to continue from and after July 1, 1935, as before said date, to furnish and supply them upon orders for cars to load and ship bulk grain, such equipment for such purpose as is suitable safely to carry bulk grain", and that if ordinary box cars were furnished upon such orders, the shippers would "expect them to be fully coopered or prepared" with grain doors; that "regardless of the tariff items" the shippers declined and would decline to pay any charges whatsoever" for the installation of grain doors in cars tendered for loading the bulk grain; that if the carriers did not install grain doors in such cars, the shippers would "demand reimbursement in full together with interest for each and every" expenditure for the installation of grain doors by the shipper (R. 60-61).

In reply to the shippers' letter of July 2, 1935, plaintiff carrier and the other carriers protested that the installation by them of grain doors without the shippers paying the tariff charges would be a violation of law, and stated that unless "unqualified arrangements" were made it would be necessary to provide the cars which did not have grain doors installed. By further correspondence the shippers continued to demand that the carriers install grain doors without charge, and the carriers continued to protest that the tariff required the shippers to pay the carriers for the service of installing grain doors when performed by the carrier at the request of the shipper (R. 62-66). Following the shipper's letter of July 2, 1935, and during the period of July 5, 1935, to February 29, 1936, plaintiff carrier in fact installed grain doors in the cars in question, and made demand upon the shipper for the payment of the charge provided by the tariff (R. 63-4). The shipper loaded and shipped the cars so equipped but refused to pay the charges demanded (R. 64, 66).

In both the District Court (R. 104-5) and in the Circuit Court of Appeals, (R. 125-8) plaintiff carrier took the position the shipper was liable both because the shipper's letter of July 2, 1935, constituted "prior arrangements" for a definite period under the tariff, and because if there were not prior arrangements in strict compliance with the tariff, such arrangements were unnecessary or waived and the shipper liable for the charge by reason of the shipper's ordering the installation of the grain doors, the carrier's performing it and the shipper's accepting, loading and shipping of the cars with the installation so performed.

The District Court by memorandum opinion (R. 111-12) and the Circuit Court of Appeals for its majority opinion held that the shipper's request that the plaintiff carrier install the doors from and after July 1, 1935 accompanied by the shipper's statement that it would not pay for the service was not a prior arrangement within the meaning of the tariff, and that the making of a prior arrangement was a condition precedent to the accrual of the charge and could not be and was not waived by the shipper (R. 116, 121).

Differing with the majority opinion of the Circuit Court of Appeals, Judge Woodrough in his dissenting opinion held: (R. 123).

> "The 'arrangement' required by the tariff is for the shipper to let the railroad know before shipment which one as between the two of them is to perform the service in question and for how long. Nothing else. These shippers unequivocally indicated their expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935'. Their accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods

they shipped. If the courts require them to pay, discrimination between those who have had the service and have paid for it and those who have had it without paying for it will be avoided. Discrimination is the evil and the courts should help, not hinder, doing away with it."

Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals in holding in effect that the shipper could order and demand that the carrier install grain doors from and after July 1, 1935, and by at the same time refusing to pay the tariff charge for the service when performed by the carrier, prevent the order from constituting a "prior arrangement" within the meaning of the tariff, and escape liability for the tariff charge, has decided an important precise question of Federal Law which has not been but should be settled by this court.

2. In holding in effect that the shipper could order and demand that the carrier install grain doors from and after July 1, 1935, and by at the same time refusing to pay the tariff charges for the installation when performed by the carrier, prevent the order from constituting a prior arrangement within the meaning of the tariff, and escape liability for the charges, the Circuit Court of Appeals of the Eighth Circuit has rendered a decision in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit on the same matter of the obligation to pay the tariff rate for services received under the tariff, *Wabash R. R. Co.* v. *Horn*, 40 Fed. (2d) 905, 906 (C. C. A. 7), in which it was held that one who becomes the owner of a car in transit and by letter orders a reconsignment of the car by the carrier could not prevent liability for freight charges

tating in the letter that all charges were to follow car.

Said decision conflicts in the same respect with the wing cases: *China Fire Ins. Co.* v. *Davis*, 50 Fed. 389, C. C. A. 2, 390, 392; *Western Grain Co.* v. *way Co.*, 56 Fed. (2d) 160, C. C. A. 5, 162; *Davis, ctor General of Railroads* v. *Oil Co.*, 285 Fed. 470, . A. 4, 472-3.

3. The Circuit Court of Appeals in holding that shipper's letter of July 2, 1935 did not constitute ior arrangement within the meaning of the tariff, in refusing to hold, as held in the dissenting opinion udge Woodrough, that "the 'arrangement' required he tariff is for the shipper to let the railroad know re shipment which one as between the two of them perform the service in question and for how long"; the "shippers unequivocally indicated their ex- tion that the railroad would perform the service and l the time 'from and after June 1, 1935' "; and "their accompanying threat not to pay for the ce was brutum fulmen—as though they had said they d not pay the freight on the goods they shipped". decided a Federal question in a way probably in ict with applicable decisions of this court, to-wit: *burgh, etc. R. R. Co.* v. *Fink*, 250 U. S. 577, 581-3, Ct. 27, 28; *N. Y. C. R.* v. *York, etc. Co.*, 256, U. S. 408, 41 S. Ct. 509, 510; *Loomis* v. *Lehigh Valley R.* o., 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30; *Penn.* o. v. *International Coal Co.*, 230 U. S. 184, 197, 33 . 893, 896; and *Robinson* v. *B. & O. R. Co.*, 222 U. S. 509, 32 S. Ct. 114-115; to the effect that carrier's es are fixed by the tariff and the carrier is re- d to collect and the shipper to pay the full charges d in the tariff filed by the carrier with the Inter-

state Commerce Commission, and *Menasha Paper Co.* *Chicago & Northwestern Ry. Co.*, 241 U. S. 55, 59-6 36 S. Ct. 501, 503-4, to the effect that demand by t shipper for service offered by the tariff makes it t duty of the carrier to perform the service.

4. The Circuit Court of Appeals in holding t shipper was not liable for the tariff charges after havi ordered the carrier to perform the service as offer by the tariff, and having accepted the installation of t doors by plaintiff carrier and loaded and shipped t cars, has decided a Federal question in a way probab in conflict with the applicable decisions of this cou to-wit: *Great Northern Ry. Co.* v. *Delmar*, 283 U. 686, 690-1, 51 S. Ct. 579, 581, and *American Railway E press Co.* v. *Lindenburg*, 260 U. S. 584, 588-90, 43 S. C 206, 208-9, to the effect that the tariff will be construed avoid discrimination rebates and preference and *Pitt burgh, etc. R. R. Co.* v. *Fink*, 250 U. S. 577, 581-3, 40 Ct. 27, 28; *N. Y. C. R.* v. *York, etc. Co.*, 256 U. S. 40 408, 41 S. Ct. 509-510; *Loomis* v. *Lehigh Valley R. Co.*, 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30; *Armo Packing Co.* v. *United States*, 209 U. S. 56, 71-2, 28 Ct. 428, 431; *Menasha Paper Co.* v. *Chicago & North western Ry. Co.*, 241 U. S. 55, 59-60, 36 S. Ct. 501, 503- and other cases, to the effect that the avoidance by shipper of the payment of tariff charges fixed for service rendered by the carrier under the tariff co stitutes unlawful discrimination under the Interstat Commerce Act.

5. The Circuit Court of Appeals in refusing t hold that regardless of whether there was a prior a rangement strictly within the terms of the tariff, th shipper having ordered the installation of the doors, th carrier having performed the installation and the shi

per having accepted, loaded and shipped the cars with the doors installed, was not liable for the tariff charges, has decided a Federal question in a way probably in conflict with the applicable decisions of this court, to-wit: *Pittsburgh, etc. R. R.* v. *Fink*, 250 U. S. 577, 582-3, 40 S. Ct. 27, 28; and *N. Y. C. R.* v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510, to the effect that a consignee who receives delivery of a shipment accepts the service of carriage and becomes liable for the tariff charges.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals in the case numbered and entitled on its docket Number 11047, "Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of Chicago, Rock Island and Pacific Railway Company, a corporation, Appellants, vs. Simonds-Shields-Lonsdale Grain Company, a corporation, Appellee", to the end that this cause may be reviewed and determined by this court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the court, and your petitioners pray that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, which is filed as a part of and as an exhibit to the petition may be treated as a return to said Writ of Certiorari; and your petitioners pray that they may have such other and further remedies in the premises as to the court may seem appropriate

and in conformity with law; and your petitioners will ever pray.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, Chicago, Rock Island and Pacific Railway Company, a Corporation,

Petitioners,

CHARLES M. MILLER,
CYRUS CRANE,
GEO. J. MERSEREAU,
DEAN WOOD,
WRIGHT CONRAD,
HALE HOUTS,

Counsel for Petitioners.

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VS.

IMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURT BELOW.

The opinions (R. 116, 123) of the Circuit Court of ppeals are not yet reported. The opinion of the Dis-ct Court (R. 111-3) is reported 19 Fed. Supp. 438.

II.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

a. Statutory Provisions Believed to Sustain the Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. A., Section 347 (a), page 359), and under the same Act, c. 229, Section 8, 24 Stat. 940 (28 U. S. C. A. Section 350, page 376). The case originated in the United States District Court under the Acts of March 3, 1911, c. 231, Section 24, par. 8, 36 Stat. 1092 and October 22, 1913, p. 32, 38 Stat. 219 (28 U. S. C. A., Section 41 (8), p. 594), as a suit arising under the Interstate Commerce Act, more particularly referred to hereinafter and quoted in the Appendix, post.

b. The Date of the Judgment to be Reviewed.

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court was entered July 7, 1938 (R. 116, 124) and appellants' petition for rehearing was denied and the judgment by the Circuit Court of Appeals became final August 4, 1938 (R. 131). This petition for certiorari and supporting transcript of record are filed in this court within three months from August 4, 1938.

c. Nature of the Case and of the Rulings of the Circuit Court of Appeals Relied Upon as Basis of This Court's Jurisdiction.

The case was an action by plaintiff carrier to recover the charges provided by the freight tariff on file

with the Interstate Commerce Commission for service rendered for the shipper of installing grain doors in box cars for interstate shipment of bulk grain by the shipper under a tariff provision providing that grain doors "shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time; * * * Kansas City . . . . . Mo.-Kan."

The Circuit Court of Appeals by its majority opinion held that a letter from the shipper to the carrier directing the carrier to install grain doors from and after July 1, 1935, but also stating that the shipper would not pay the tariff charge therefor, did not constitute a prior arrangement within the meaning of the tariff; that a prior arrangemen' was a condition precedent to liability by the shipper, and that the shipper was not liable for the charge, although following the letter the doors were installed by plaintiff carrier, and the cars thereafter accepted, loaded, and shipped in interstate commerce by the shipper. The majority of the court refused to hold, as was held by Judge Woodrough in a dissenting opinion, that the only arrangement required by the tariff was for the shipper to let the railroad know "before shipment which one as between the two of them is to perform the service in question and for how long"; and that the shipper "unequivocally indicated" its expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935' "; that the "accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods they

had shipped;'' that discrimination would be avoided by requiring the shipper to pay.

d. Cases Believed to Sustain the Jurisdiction of this Court.

Menasha Paper Co. v. *Chicago & Northwestern Ry.*, 241 U. S. 55, 59-60, 36 S. Ct. 501, 503-4.

Pittsburgh R. R. Co v. *Fink*, 250 U. S. 577, 581-3, 40 S. Ct. 27, 28.

N. Y. C. R. v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510.

Loomis v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50; 36 S. Ct. 228, 229-30.

Pennsylvania R. Co. v. *International Coal Co.*, 230 U. S. 184, 197, 33 S. Ct. 893, 895.

Robinson v. *B. & O. R. R. Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115.

Great Northern Ry. Co. v. *Delmar*, 283 U. S. 686, 690, 51 S. Ct. 579, 581.

Wabash R. R. Co. v. *Horn*, 40 Fed. (2d) 905, 906 (C. C. A. 7).

III.

STATEMENT OF THE CASE.

Petitioners have stated the case in the "Summary Statement of the Matter Involved", Part "I" in the foregoing petition for certiorari, which is adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals erred in affirming the judgment of the District Court in favor of defendant shipper.

(2) The Circuit Court of Appeals erred in not holding that the shipper's letter of July 2, 1935, demanding plaintiff carrier to install grain doors from and after July 1, 1935, was not a prior arrangement within the meaning of the tariff and rendering the shipper liable for the tariff charges, although the shipper in the same letter stated that it would not pay the charges.

(3) The Circuit Court of Appeals erred in not holding that the shipper's request for the installation of the grain doors, compliance therewith by the carrier and the shipper's acceptance, loading and shipping of the cars in interstate commerce, rendered the shipper liable for the tariff charges, regardless of whether there was a prior arrangement within the strict terms of the tariff provision.

ARGUMENT.

Summary of the Argument.

POINT A.

The tariff made the installation of grain doors a service to be performed by or at the expense of the shipper in all cases, and by the carrier only as agent for the shipper and for a charge specifed by the tariff and not included in the other transportation charges. The performance of the service by the carrier without charge would constitute unlawful discrimination.

Since the carrier could not lawfully agree to perform the service free of charge for the shipper, the same result cannot be accomplished by indirection.

POINT B.

The only prior arrangement required by the tariff was for the shipper to request or demand that the carrier install the grain doors as the agent of the shipper. The shipper's liability for and the amount of the charges was not the subject of the arrangement but was fixed by the tariff and therefor by law. There was a complete "prior arrangement" under the tariff.

POINT C.

The installation of grain doors by the carrier at the request of the shipper and the shipper's acceptance of the installations and loading and shipping of the cars in interstate commerce rendered the shipper liable for the tariff charges under the Interstate Commerce Act requiring uniform payment of all tariff charges and the prohibiting of discrimination, regardless of the manner and form of prior arrangement.

POINT D.

Jurisdictional grounds for review are presented.

POINT A.

The tariff made the installation of grain doors a service to be performed by or at the expense of the shipper in all cases, and by the carrier only as agent for the shipper and for a charge specifed by the tariff and not included in the other transportation charges. The performance of the service by the carrier without charge would constitute unlawful discrimination.

Prior to July 1, 1935, the installation of grain doors at Kansas City and other terminal points had been a carrier service performed by the carrier as a part of the transportation and absorbed in the transportation charges. The tariff provision in question which went into effect July 1, 1935, still required the carrier to furnish material for grain doors but made the service of installation a shipper's service, that is to say a service to be performed by the shipper itself or through an agent in all cases, and in all cases at the expense of the shipper. Under the tariff the carrier was offered as an agent for the shipper for the purpose of installation of grain doors upon the payment of the charge therein specified of One Dollar ($1.00) per car. For convenience we repeat the quotation of the specific tariff provision:

> "The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time:
>
> * * * Kansas City - - - - Mo.-Kan."

The only circumstances under which the tariff permitted the carrier to perform the installation service were as the agent of the shipper and for the tariff compensation. The tariff, when it was on file, and as long as it was not disapproved by the Interstate Commerce Commission, had the effect of a statute. *Pennsylvania R. R. Co.* v. *International Coal Company*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; *Robinson* v. *B. & O. Railroad Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115. Prior to the trial of the case at bar the provision was expressly approved by the Interstate Commerce Commission as reasonable, except as to the amount of the charge, which was reduced from one dollar ($1.00) per car to sixty cents (60c) per car. (R. 82, 86), 220 I. C. C. 753. Interstate Commerce Commission Report was in evidence (R. 73), and the finding and ruling was available to all shippers and carriers regardless of whether they were parties to the particular proceedings. *A. J. Phillips Co.* v. *Grand Trunk Western Railway*, 236 U. S. 662, 665, 35 S. Ct. 444, 445. Plaintiff carrier reduced the amount sued for from one dollar ($1.00) per car to sixty cents (60c) per car and sought judgment for the latter amount. (R. 104).

The Interstate Commerce Commission held "that when, at the request of the shipper the carrier installs the grain doors, it is entitled to a reasonable charge for the service rendered." (R. 82). The decision of the Circuit Court of Appeals is in conflict with this ruling of the Interstate Commerce Commission as well as with the decisions of this court and the Circuit Court of Appeals relied upon by petitioners.

Since under the tariff plaintiff carrier could perform the service of installation of grain doors only as the agent of the shipper, and at a specific charge in ad-

dition to the other freight charges, to permit the shipper to receive the benefit of the installation by the carrier without requiring the shipper to pay the charge, necessarily would be to permit unlawful discrimination under the Interstate Commerce Act which requires uniform payment of all tariff charges, 49 U. S. C. A. Sections 2, 6 (7), 10 (1) (2) (4) and prohibits preference or discrimination in any form or by any device, 49 U. S. C. A. Section 41 (1) quoted in Appendix Post. *Pittsburgh R. R. Co.* v. *Fink*, 250 U. S. 577, 581-3, 40 S. Ct. 27, 28; *N. Y. C. R.* v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50; 36 S. Ct. 228, 229-30; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; and *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115; *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584, 589-90; 43 S. Ct. 206, 208-9.

If your petitioners in response to the shippers' letter of July 2, 1935, (R. . .) had agreed with the shippers to disregard the tariff and perform the service without charge, as demanded by the shippers in said letter, any such agreement would be null and void and the proper charge would nevertheless accrue under the foregoing decisions of this Court. Since the charge could not therefore be escaped directly by the shipper with the railroads, it is submitted they cannot escape the charge indirectly.

It is the control placed in the shipper to defeat the charge at will, resulting from the decision of the Circuit Court in this case, that establishes a precedent for avoiding uniformity in tariff charges invariably required in the foregoing decisions of this Court. Also see. *China Fire Ins. Co.* v. *Davis*, 50 Fed. (2d) 389,

C. C. A. 2, 390, 392; *Western Grain Co.* v. *Railway Co.*, 56 Fed. (2d) 160, C. C. A. 5, 162; *Davis, Director General of Railroads* v. *Oil Co.*, 285 Fed. 470, C. C. A. 4, 472-3.

The shipper's letter of July 2, 1935, demanding that the carrier install grain doors, in view of the tariff provision providing that the carrier would act as shipper's agent for that purpose, for a tariff charge, made it the duty of the shipper to install the grain doors. *Menasha Paper Co.* v. *Chicago & Northwestern Ry. Co.*, 241 U. S. 55, 59-60, 36 S. Ct. 501, 503-4. When the carrier performed the service it performed a legal obligation and was in no sense a volunteer. The tariff put upon the shipper the corresponding obligation to pay for the service so performed.

Doubtless if the carrier had installed the grain doors without any request from the shipper, the shipper would have been privileged to refuse the cars and the carrier would have been and remained a mere volunteer. Since in the case at bar, the shipper demanded that the carrier install the doors, accepted the cars after the installation, and loaded and shipped them in interstate commerce, the installation of the doors by the carrier can not be regarded other than a service by the carrier as agent of shipper under the tariff and for which the shipper is by law required to pay the tariff charges.

In *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50; 36 S. Ct. 228, 229-30, it was held that absent a tariff provision requiring the carrier to absorb the expense of grain door installation, the shipper could not perform the installation and recover the expense thereof from the carrier. The attempt of the shipper in the case at bar to avoid payment of the installation per-

formed by the carrier at the request of the shipper, under the tariff placing the expense of installation in all cases on the shipper, is an attempt by the shipper to violate the express provisions of the tariff and an even stronger case in the favor of the carrier than the Loomis case.

POINT B.

The only prior arrangement required by the tariff was for the shipper to request or demand that the carrier install the grain doors as the agent of the shipper. The shipper's liability for and the amount of the charges was not the subject of the arrangement but was fixed by the tariff and therefor by law. There was a complete "prior arrangement" under the tariff.

Since the tariff made installation of grain doors a service to be performed by and at the expense of the shipper in all cases and by the carrier only as agent of the shipper and for compensation provided by the tariff (Point A *supra*) the only arrangement to be made by the shipper with the carrier, under the tariff, to render the shipper liable for the tariff charges, was a request or demand by the shipper that the carrier act as his agent to install grain doors. The tariff, and therefore the law, fixed the obligation and amount of the charge and neither the obligation nor the amount was a matter for negotiation or arrangement by the shipper.

Pittsburgh R. R. Co. v. *Fink*, 250 U. S. 577, 581-3, 40 S. Ct. 27, 28; *N. Y. C. R.* v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50; 36 S. Ct. 228, 229-30; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; and *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115.

Manifestly the letter of July 1 whereby the shipper demanded that the carrier install the grain doors from

and after July 1, 1935, was a complete prior arrangement within the meaning of the tariff rendering the carrier liable for the tariff charge for the grain door installations by the plaintiff carrier following the letter and during the period of July 5, 1935 to February 29, 1936. Any other construction of tariff or holding as to the sufficiency of the letter permits unlawful discrimination. The whole matter, both in reasoning and in result, was distinctly, ably and tersely stated by Judge Woodrough in his dissenting opinion, (R. 123):

> "The 'arrangement' required by the tariff is for the shipper to let the railroad know before shipment which one as between the two of them is to perform the service in question and for how long. Nothing else. These shippers unequivocally indicated their expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935'. Their accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods they shipped. If the courts require them to pay, discrimination between those who have had the service and have paid for it and those who have had it without paying for it will be avoided. Discrimination is the evil and the courts should help, not hinder, doing away with it."

POINT C.

The installation of grain doors by the carrier at the request of the shipper and the shipper's acceptance of the installations and loading and shipping of the cars in interstate commerce rendered the shipper liable for the tariff charges under the Interstate Commerce Act requiring uniform payment of all tariff charges and the prohibiting of discrimination, regardless of the manner and form of prior arrangement.

While it is believed that the case is properly disposed of on the ground that there was a complete prior

arrangement within the meaning of the tariff, it is further submitted that regardless of that question, the requirement of the Interstate Commerce Act that all shippers alike pay interstate tariff charges on all services of and connected with interstate transportation, and the prohibition against discrimination in any form or any device, rendered the shipper liable as a matter of law for the tariff charges for the installation in question, upon the undisputed facts that the installation was requested by the shipper, was performed by the carrier, was accepted by the shipper, and the cars so equipped loaded and shipped in interstate commerce by the shipper.

The decisions of this court in *Pittsburgh etc. R. R. v. Fink*, 250 U. S. 577, 582-3, 40 S. Ct. 27, 28; *N. Y. C. R. R. v. York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510, to the effect that a consigner accepting an interstate shipment becomes liable for all of the tariff charges, it is submitted, are authority for the proposition that the shipper is liable regardless of whether there was a prior arrangement within the technical meaning of the tariff.

POINT D.

Jurisdictional grounds for review are presented.

It is believed that the question of whether the shipper may ask for and accept service by the carrier offered by the tariff and by refusing to pay therefore escape liability for the charge fixed by the tariff for the service, is an important and precise question of Federal law which has not been but should be settled by this court. (Petition, I, *supra*, 1.) It is believed that in holding that the shipper can so escape the charge, the Circuit Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decision of the Cir-

cuit Court of Appeals for the Seventh Circuit in *Wabash R. R.* v. *Horn*, 40 Fed. (2d) 905-906 (C. C. A. 7) in which it was held that one who becomes the owner of a car in transit and by letter orders reconsignment of the car by carrier could not prevent liability for freight charges by stating in the letter that all charges were to follow the car. (Petition, II, 2, *supra*).

It is believed that in holding that the letter demanding that the carrier perform the service did not constitute a prior arrangement within the tariff and render the shipper liable, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this court. (Petition III 3, *supra*); and in holding that the shipper is not liable for the service ordered, performed and accepted, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of the court (Petition II, 4 *supra*), and regardless of whether there was a prior arrangement technically complying with the tariff provisions (Petition II, 5 *supra*.)

CONCLUSION.

It is therefore respectfully submitted that the case is one calling for the exercise by this court of its supervisory powers by granting a Writ of Certiorari and thereafter reviewing and reversing the said decision.

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APPENDIX.

Statutes Involved.

Section 2, 49 U. S. C. A. p. 137 (1920) (Transportation Act of Feb. 28, 1920, C. 91, §404, 41 Stat. 479).

Sec. 2. *Special rates and rebates prohibited.* If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. (Feb. 4, 1887, c. 104, Sec. 2, 24 Stat. 379; Feb. 28, 1920, c. 91, Sec. 404, 41 Stat. 479.)

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Section 6 (7), 49 U. S. C. A.—p. 283 (1920) (Transportation Act of Feb. 28, 1920, c. 91, §411, 41 Stat. 483.)

Sec. 6, par. (7) *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of pas-

sengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time: nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * * *

Section 41 (1), U. S. C. A., p. 308 (1906) Elkins Act as amended by Hepburn Act of June 29, 1906, c. 3591, §2, 34 Stat. 587).

Section 41. *Liability of corporation carriers and agents; offenses and penalties.* (1) Liability of corporation common carriers; offenses; penalties; jurisdiction. Anything done or omitted to be done by a corporation common carrier, subject to the preceding chapter, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under Sections 41, 42, or 43, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by Sections 41, 42, or 43, with reference to such persons, except as such

penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000; Provided, That any person, or any officer or director of any corporation subject to the provisions of Sections 41, 42, or 43, or of the preceding chapter, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district

in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Section 10 (1), (2) and (4), 49 U. S. C. A., p. 354-6 (Transportation Act of February 28, 1920, c. 91, Sec. 414, 41 Stat. 483).

(1) *Violation by carrier or officer; penalty.* Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the juridiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense; *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates,

fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

(2) *False billing or classification by carrier; penalty.* Any common carrier subject to the provisions of this chapter, or whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

(4) *Inducing unjust discrimination; penalty; liability for damages.* If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid

or abet any common carrier in any such unjust dis
crimination, such person or such officer or agent o
such corporation or company shall be deemed guilty
of a misdemeanor, and shall, upon conviction thereo
in any court of the United States of competent juris
diction within the district in which such offense wa
committed, be subject to a fine of not exceeding $5,000
or imprisonment in the penitentiary for a term of no
exceeding two years, or both, in the discretion of the
court, for each offense; and such person, corporation
or company shall also, together with said common carrier
be liable, jointly or severally, in an action to be brough
by any consignor or consignee discriminated against in
any court of the United States of competent jurisdiction
for all damages caused by or resulting therefrom.

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